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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SAN FRANCISCO DIVISION OF JUDGES

BODEGA LATINA CORPORATION D/B/A EL SUPER,

Respondent,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 324

Charging Party.

Case No. 21-CA-183276

CHARGING PARTY'S POST-TRIAL BRIEF

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I. INTRODUCTION

Bodega Latina Corporation, d/b/a El Super, ("El Super" or "Company") has denied Mireya Beltran de Pineda's ("Mireya Beltran" or "Ms. Beltran") request to apply her accrued, paid vacation time towards her medical leave due to her activities protected under Section 7 of the National Labor Relations Act, including her public support of the Union and her participation in Union activities. The fact that the decision was motivated by Ms. Beltran's protected activity is expressly stated in an internal Company email, sent days after Ms. Beltran's request, in which the highest-level manager at Ms. Beltran's location and the individual who ultimately denied Ms. Beltran's request, Store Manager Jose Luna, instructs a human resources manager at corporate headquarters to not pay Ms. Beltran before he has had a chance to speak with the human resources manager because Ms. Beltran is "pro union." Ms. Beltran was never paid pursuant to her request, despite having available hours and qualifying for payment under the terms of the Company's policies, state and federal law, and a binding, implemented last, best, and final offer.

While El Super suggested at trial that someone other than Jose Luna – someone insulated from Mr. Luna's anti-union remark – made the decision to deny Ms. Beltran's request, the Company failed to identify who that person was, let alone have that person articulate why the decision was made. Likewise, while the Company suggested a number of potential, nondiscriminatory reasons why the decision *may* have been made, it failed to explain why, exactly, the decision *was* made or to otherwise demonstrate that the same decision would have been made in the absence of Ms. Beltran's protected activity. As such, one can only conclude that the Union's theory is correct: that the Company violated Section 8(a)(3) of the Act by denying Ms. Beltran's request because of her Union support.

Finally, by presenting Ms. Beltran with the email string referenced above, in which her store manager explicitly advocated against Ms. Beltran's request because she is "pro union," El Super has discouraged the exercise of her rights under Section 7 of the Act.

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II. FACTS

El Super operates an international chain of grocery stores in both the United States and Mexico. Within the United States alone, El Super operates fifty-eight locations (Tr. 225:16-18 (Lima)) across five states, including El Super Store #11, located in Anaheim, California ("Anaheim Store").

United Food and Commercial Workers, Local 324 ("Local 324" or "Union") represents a unit of employees working at the Anaheim Store. The previous collective bargaining agreement between El Super and the Union (collectively "Parties") expired on September 27, 2013. GCX 2. In 2014, the Company implemented its purported last, best and final offer, which has been in effect since the date of implementation through all times relevant to this action ("Implemented Agreement"). GCX 2. The Parties have been negotiating a successor contract since the previous collective bargaining agreement expired in 2013.

Mireya Beltran de Pineda ("Mireya Beltran" or "Ms. Beltran") has worked at the Anaheim Store since April 9, 2010. Tr. 102:10-16 (Beltran). At all times relevant to this case, Ms. Beltran was employed as a cashier. Tr. 102:21-22 (Beltran).

A. Mireya Beltran's Union participation

Ms. Beltran is an active member of the Union. Ms. Beltran has regularly participated in Union meetings and Union activities throughout the Parties' contentious negotiations for a successor contract. Tr. 104:13-15 (Beltran); 60:22-25 (Perez). Moreover, for about six months around the end of 2015 through the beginning of 2016, Ms. Beltran wore a union button to work clearly displayed on the front of her uniform. Tr. 105:11-106:7 (Beltran). This button said the word "respect" and was issued to employees as part of a campaign to negotiate a fair successor collective bargaining agreement. Tr. 107:3-4 (Beltran). Sometime around January 2016, Store Director Jose Luna called Ms. Beltran into his office and asked her why she continued to wear the Union button to work. Tr. 106:1-107:4 (Beltran). Ms. Beltran told Mr. Luna that she was wearing the button in support of the negotiation of a fair contract between the Union and the Company. Tr. 107:1-4 (Beltran).

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Similarly, in December 2015, the Union held a one-day strike at the Anaheim Store to further support their effort to negotiate a successor collective bargaining agreement. Tr. 104:13-21 (Beltran). Ms. Beltran participated in this strike for around eleven hours, from 11:00 a.m. until 10:30 p.m., along with around fifty other employees. Tr. 104:25-105:9 (Beltran). Throughout this eleven-and-a-half-hour period, Mr. Luna and other high level managers regularly appeared at the entrance of the store to observe the employees that were on strike. Tr. 34:6-14 (Perez); 107:16-108:3 (Beltran). Mr. Luna also left the store a number of times, walking by striking employees, including Ms. Beltran, to retrieve carts from the parking lot. *Id.*

B. Mireya Beltran's March 22, 2016 vacation request and Jose Luna's denial of the same

On March 22, 2016, Ms. Beltran was told by her doctor that she needed surgery, and, while he was generally booked through the next several months, he had an opening the very next day. Tr. 127:2-12 (Beltran). Therefore, on the same day, March 22, Ms. Beltran went to Store Manager Luna's office to request time off for her surgery and recovery. Tr. 108:13-24 (Beltran). Along with Mr. Luna, Assistant Store Director Miguel Ruiz was also present in the office, but did not participate in the meeting. *Id.* During this meeting with Mr. Luna, Ms. Beltran presented Mr. Luna with a note from her doctor indicating that she needed surgery and would be unavailable to work for two weeks while she recovered. Tr. 109:8-10 (Beltran). Ms. Beltran also received, from Mr. Luna, a form to request using her accrued vacation as compensation during her time off. Tr. 109:14-16; 127:20-24 (Beltran). Ms. Beltran completed this form in Mr. Luna's office and returned it to Mr. Luna for approval. *Id.* As Ms. Beltran described it at the hearing, this form "had some boxes" where the employee was asked to "put in the dates" that they were "going to be out," the date the request was made, and a signature. Tr. 109:19-22 (Beltran). Upon being presented with General Counsel Exhibit 7 at trial, a blank copy of the Company's vacation request form, Ms. Beltran confirmed that the form she completed in Mr. Luna's office on March 22 was identical. Tr.128:3-5 (Beltran); GCX 7. Ms. Beltran did not keep a copy of either the note from her doctor or the vacation request form that she completed. Tr. 110:1 (Beltran). Ms. Beltran then presented the vacation request form to Mr. Luna to request that her vacation be paid while on medical leave. Tr. 110:8-9

(Beltran). Significantly, when Ms. Beltran presented these forms to Mr. Luna and requested that her vacation be paid while on medical leave, Mr. Luna did not mention that any other forms were required in order for Ms. Beltran to receive vacation pay. Tr. 110:20-23 (Beltran). Moreover, Mr. Luna stated that he would call Ms. Beltran when he "received a response from human resources." Tr. 110:21-25 (Beltran).

On March 23, Ms. Beltran had surgery. Tr. 126:23-127:1 (Beltran). Three or four days later, Ms. Beltran received a call from Mr. Luna on her cell phone while she was still recovering from surgery. Tr. 111:15-17 (Beltran). Mr. Luna told Ms. Beltran during this phone conversation that her request for vacation "was not approved." Tr. 111:18-20 (Beltran). Significantly, Mr. Luna did not say that Ms. Beltran's request was denied because she did not have sufficient vacation hours, because she did not complete the correct forms, or because she was about to be paid for previously-accrued vacation pursuant to an unrelated settlement agreement. Tr. 111:19-112:6 (Beltran). Indeed, Mr. Luna did not give any reason for the denial. *Id.* Mr. Luna simply stated that human resources had denied Ms. Beltran's request. Tr. 112:7-10 (Beltran).

El Super's witness Miguel Ruiz claimed that Ms. Beltran never completed a vacation request form or a time-off form when she presented Mr. Luna with her doctor's note on March 22. Rather, Mr. Ruiz claims that Ms. Beltran simply walked into Mr. Luna's office, handed Mr. Luna her doctor's note, and left without any additional conversation, and that this was somehow sufficient to establish that she was granted *unpaid* time off through the period of recovery listed on the doctor's note. However, as discussed extensively below, this description of events is simply not credible.

Moreover, El Super asserted at trial that the telephone call between Mr. Luna and Ms. Beltran must have never taken place because Mr. Luna did not have the power to make decisions related to vacation pay. However, as also discussed below, they provide no direct evidence on this point whatever, and this single piece of circumstantial evidence falls woefully short of contradicting Ms. Beltran's credible, first-hand knowledge. This is particularly true given El Super's failure to identify who, if not Mr. Luna, ultimately made the decision to deny the vacation request or

conveyed this decision to Ms. Beltran, and to explain its shifting and contradictory explanations for why the decision was made.

C. Jose Luna's presentation of the pro-union email string to Mireya Beltran in response to her request for an accounting of her available vacation hours

Around the beginning of April 2016, Ms. Beltran went to Mr. Luna's office to request a copy of her vacation hours. Tr. 112:21-113:2 (Beltran). In response to Ms. Beltran's request, Mr. Luna printed out a page containing a string of emails and gave it to Ms. Beltran. Tr. 113:5-8 (Beltran); GCX 6; EX 1. The emails were written in English, and documented a correspondence between Mr. Luna, Human Resources Generalist Angelica Lima, and Payroll Manager Norma Macias. GCX 6; EX 1. The first email, sent March 28, 2016 at 6:05 p.m., is a request for an accounting of Ms. Beltran's available vacation hours, sent from Ms. Lima to Ms. Macias. *Id.* Despite Ms. Lima's subsequent claims at trial that Mr. Luna had no authority over vacation requests and that her inquiry was in response to a request from Mr. Perez, Ms. Lima copied Mr. Luna on this email. *Id.* Ms. Macias responded the same day, at 7:39 p.m., by stating that Ms. Beltran had "95.53hours [sic]" of "[a]vailable vacation." *Id.* Ms. Lima responded the following morning, March 29, 2016, at 8:21 a.m. thanking Ms. Macias. *Id.* Less than ten minutes after this email was sent, Mr. Luna imposed himself into the conversation, sending an email ("March 29 Email") to Ms. Lima stating:

> [c]an you please call me tomorrow before we decide to pay her. The contract states she needs to give us 30 day notice . [sic] She is pro union and calls in sick in sick [sic] on us a lot.

Id. Ms. Lima received this email and responded the same day at 10:40 a.m. *Id.*

While Ms. Beltran has some knowledge of English, Spanish is her primary language and the only language in which she is fluent. Tr. 113:9-20 (Beltran). Ms. Beltran reviewed the string of emails upon receiving it from Mr. Luna, and while she understood that it mentioned her Union support and calling in sick, she "didn't understand very well," and did not appreciate the significance of the email at the time. Tr. 114:2-11 (Beltran). Ms. Luna then brought the document containing the string of emails home for her records. Around four weeks later, Ms. Beltran's sister-in-law, a native English speaker, happened to be at Ms. Beltran's house, and at Ms. Beltran's

request, reviewed the document. Tr. 114:12-115:21 (Beltran). Ms. Beltran's sister explained to her that the email stated that because she was a member of the Union and called in sick too much, she need to submit her vacation request at least 30 days in advance. *Id.*

D. Union involvement in Mireya Beltran's vacation request, grievance processing, and the instant charge

Around March 28, 2016, Ms. Beltran contacted her Union Representative Jose Perez, informed him of her situation, and asked for his assistance in contacting Human Resources to get to the bottom of why they had denied her request as Mr. Luna had told her on the phone. Tr. 42:15-43:7 (Perez). Mr. Perez then emailed Ms. Lima to inquire about Ms. Beltran's vacation request and bring to her attention that Ms. Beltran "is asking" if the Company "can pay her a weeks vacation" while she is on leave, and inquiring if Ms. Lima could "please help her out." GCX 4. Ms. Lima replied that she would request her vacation balance and "circle back" with him. *Id.*

Per the Company's account of events, Mr. Perez's email to Ms. Beltran was the first time anyone, including Ms. Beltran, requested that Ms. Beltran be paid for her time off. However, again, the Company's evidence on this point is not credible.

Having heard no response from Ms. Lima, on April 5, 2016, Mr. Perez sent another email following up on his initial inquiry about Ms. Beltran's vacation pay request. Tr. 43:5-12 (Perez); GCX 5. Ms. Lima responded by email the same day, stating "Mireya [Beltran] will not be paid for vacation. She's on a medical LOA, she can apply for FMLA." GCX 5. Mr. Luna responded less than an hour later by email, stating "[t]here has [sic] been other employees in the same predicament and were paid before. Why can't you pay her?" *Id.* Ms. Lima did not respond to Mr. Luna's request for an explanation of why Ms. Beltran would not be paid. Tr. 50:10-15 (Perez); GCX 5.

A month or so later, Ms. Beltran brought the sheet of emails Mr. Luna had given her to the Union hall to show to her Union Representative Jose Perez. Tr. 115: 22-116:4 (Beltran). Mr. Perez asked if Ms. Beltran was aware of what the letter said, and Ms. Beltran explained that her sister-in-law had translated the letter for her. Mr. Perez responded that the email was "pretty gross," given that the Company had refused to pay her vacation because of her Union support, and told her he

would be filing a grievance on her behalf to get this rectified. Tr. Tr. 46:15-47:2 (Perez). Mr. Perez filed this grievance on July 29, 2016. Tr. 47:7-8 (Perez); GCX 6.

On August 4, 2016, Mr. Perez met with Ms. Lima to discuss a number of issues, including Mr. Luna's anti-union email of March 29. Tr. 47:16-48:3 (Perez).[1] Mr. Perez stated that:

> [he] was pretty disgusted with some of the information that had come up and that [he] was disappointed and [sic] to see how some of the employees – and based on the email – are being treated because of their Union activity.

Tr. 48:11-15 (Perez). After Mr. Perez showed her the email, "her demeanor completely changed," such that Mr. Perez "could tell she was shocked that [the Union] had a copy" of the email. Tr. 48:25-49:4 (Perez). Ms. Lima's only response to this was to ask "how did you get this email?" *Id.* Mr. Perez stated that he had received it from Ms. Beltran, who had, in turn, gotten it from Mr. Luna when she asked about her available vacation hours. Tr. 48:16-18 (Perez). After that, Ms. Lima "really did not say much about it other than she would look into it." *Id.* Significantly, Ms. Lima did not say at this meeting that Ms. Beltran's request was denied because Ms. Beltran did not complete the proper paperwork, because Ms. Beltran did not have sufficient vacation hours available, because Ms. Beltran did not request the vacation pay a sufficient amount of time in advance, or because Ms. Beltran had received a payout pursuant to an unrelated settlement a few weeks after her request. *Id.* Likewise, Ms. Lima did not try to justify or give context to Mr. Luna's email, or explain how the email could be read as anything other than an express admission that the Company considered Ms. Beltran's support of the Union as a, if not *the,* motivating factor in its decision to deny her vacation request, as Mr. Perez stated at the meeting and the email clearly supports. *Id.* Ms. Lima's failure, at that time, to raise any of the explanations subsequently articulated by the Company as to why this email is not clear evidence of a discriminatory motive, is telling.

E. Prior settlement regarding vacation pay per the Parties' Stipulated Agreement

A number of different UFCW Locals represent Respondent's employees at seven Southern California stores (collectively, "the UFCW Locals"). Stip. at 1. UFCW Local 324 represents the Company's employees at its "Anaheim" store (Store #11) and its Santa Fe Springs store (Store

[1] The Store Manager of Store 11, at the time, was also present.

#16). Local 324 is not in charge of representing Respondent's employees at any other stores. At some point prior to 2015, Respondent and the UFCW Locals disagreed over how vacation was calculated under Respondent's vacation policy. The Unions alleged that El Super made a unilateral change to the calculation of benefits. Stip. at 4. An unfair labor practice charge was filed with Region 21 over the issue, and the parties reached a settlement agreement regarding the dispute in cooperation with the Region. Stip. at 5. The settlement called for Respondent to "payout" employees, including Ms. Beltran-Pineda, for vacation pay they should have realized but for the alleged unilateral change. With respect to Ms. Beltran-Pineda, this included her accrued, but unused vacation that was due and owing as of April 9, 2015. Stip. at 6. The parties concluded the settlement agreement of the vacation payout dispute on August 7, 2015, but the first set of payouts, including the payout to Ms. Beltran-Pineda, did not occur until in or about April 2016. The first set of payouts were based on calculations through August 29, 2015. On April 8, 2016, Ms. Beltran-Pineda received two checks. The first check, for $930.85, covered 72.27 hours of vacation pay accrued through April 8, 2014 and unused through April 8, 2015. The second check, for $100.17, covered interest on this amount from the date owed until the date paid pursuant to the settlement. Stip. at 7. Because the payout on April 8, 2016 was calculated as of the August 29, 2015 date, it did not include payment of vacation pay that became due and owing after August 29, 2015. Stip. at 8.

The current vacation payout provision applicable to UFCW Local-represented employees requires that "The Employer shall pay the employee the vacation pay accrued during the employee's anniversary year, either prior to taking the vacation or on the employee's anniversary date." Stip. at 9. In an effort to complete the objective of getting all affected employees "caught up" on the payment of all owed vacation pay, El Super made a "catch up" payment to affected employees for all vacation that became due and owing after August 29, 2015. Stip. at 10. Ms. Beltran-Pineda was hired on April 9, 2010, so her anniversary year runs from April 9-April 8. Stip. at 11. Ms. Beltran-Pineda received a "catch up" vacation payment that El Super intended to bring her current for all vacation pay owed as of her last anniversary date (as of April 9, 2016) on June 24, 2016. This payment was for 22.71 vacation hours (accrued between April 9, 2014 and April 8,

2015, unused between April 9, 2015 and April 8, 2016, and due and owing as of April 9, 2016) in the amount of $298.41. No interest was paid on this amount. Stip. at 12.

III. ANALYSIS

Section 8(a)(3) of the Act forbids employers to "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." The Board will generally consider alleged violations of Section 8(a)(3) under *Wright Line*, 251 NLRB 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). In *SFO Good-Nite Inn, LLC,* the Board explained how its analysis under *Wright Line* proceeds:

> The General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals*, 350 NLRB No. 76, slip op. at 1 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). If, however, the evidence establishes that the reasons given for the employer's action are pretextual – that is, either false or not in fact relied upon – the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *Id.*, slip op. at 1-2 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enf'd.* 705 F.2d 799 (6th Cir. 1982)).

352 NLRB 268, 269 (2008);[2] *see also Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Under *Wright Line*, therefore, the focus is on the employer's motivation behind the adverse employment action. Both employer knowledge of protected activity and anti-union motivation in taking adverse action against employees may be proven by circumstantial, as well as direct evidence. *Dlubak*, 307 NLRB 1138, 1155 (1992); *FES*, 331 NLRB 9, 21 (2000).

[2] *SFO Good-Nite Inn, LLC*, 352 NLRB 268 (2008) was decided by a two-member Board but was reaffirmed in relevant part by a three-member panel at 357 NLRB 79 (2011) following the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

Section 7 of the Act grants employees the right to "self-organization, to form, join, or assist labor organizations" and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act forbids employers to "interfere with, restrain or coerce" employees in the exercise of Section 7 rights, and is the broadest of the subdivisions of Section 8(a). Intent is not required to prove violation of Section 8(a)(1). It is well-settled that:

> interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act

American Freightways Co., 124 NLRB 146, 147 (1959); *see also NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946); *Yoshi's Japanese Rest., Inc.*, 330 NLRB 1339 (2000); *Westwood Health Care Ctr.*, 330 NLRB 935 (2000); *Roadway Express*, 250 NLRB 393 (1980); *Cooper Thermometer Co.*, 154 NLRB 502, n.2 (1965).

A. Store Manager Jose Luna denied Mireya Beltran's request to use her paid vacation while on FMLA-qualifying leave because she supports the union

In the instant case, a *prima facie* case that El Super denied Ms. Beltran's request to use her vacation benefits during her medical leave is readily established because (1) El Super was aware, as El Super itself concedes, of Ms. Beltran's open and vocal support of the Union, and (2) the March 29 Email constitutes a clear admission that it harbored union animus.

1. El Super was aware of Ms. Beltran's Union support at the time her vacation request was denied because Ms. Beltran wore a Union button to work for six months, walked a picket line in front of the store for eleven hours during a one-day strike in December 2015, and explicitly told Store Manager Jose Luna as much in a conversation in January 2016

There can be no doubt that El Super management was aware that Ms. Beltran supported the Union at the time Mr. Luna denied her vacation request, given her regular and visible participation in Union activities. Indeed, Mr. Luna acknowledges her Union support in his March 29 Email. GCX 6.

Furthermore, as described above, Ms. Beltran wore a Union button on the front of her uniform for six months, from late 2015 through early 2016, in support of the Union's campaign to negotiate a successor contract. Tr. 105:11-106:7 (Beltran); 107:3-4 (Beltran). If there was any doubt as to the purpose of this button, at some point in early January 2016, Mr. Luna called Ms. Beltran into his office and asked her why she continued to wear the button everyday. Tr. 106:23-107:4 (Beltran). Ms. Beltran replied by that she was wearing the button in support of the Union's efforts to negotiate a successor contract. Tr. 106:23-107:4 (Beltran). Moreover, Ms. Beltran continued to wear her Union button despite this interrogation by the highest-level manager at her store.

In addition, in December 2015, Ms. Beltran openly participated in a one-day strike, walking the picket line for over 11 hours in front of the Anaheim Store with around fifty other employees. Tr. 104:12-105:9 (Beltran). Throughout this period, Mr. Luna and other high level managers at the Anaheim Store regularly surveilled the employees participating in the strike from the entrance of the store. Tr. 34:6-14 (Perez); 107:16-18:3 (Beltran). Furthermore, during the strike, Mr. Luna left the store on a number of occasions and walked directly past the strikers, including Ms. Beltran, while, ostensibly, collecting carts from the parking lot. *Id.* Whatever his motive for doing so, it is undeniable that Mr. Luna and other high-level managers observed Ms. Beltran participating in the strike through this eleven-hour period.

Given the above, it is clear that El Super, and Mr. Luna in particular, was aware of Ms. Beltran's activity in support of the Union. Thus the "protected activity," and "employer knowledge of that activity," prongs of the Union's *prima facie* case under the *Wright Line* framework are met.

2. El Super harbored union animus as demonstrated through Jose Luna's March 29 Email, El Super's proclivity to violate the Act, and the contemporaneous commission of other unfair labor practices

The conclusion that El Super harbored union animus and denied Ms. Beltran's vacation request in retaliation for her Union support is clearly articulated in Store Manager Jose Luna's March 29 Email. As discussed in detail below, in this email, Mr. Luna expressly advocates for denying Ms. Beltran's vacation request because she is "pro union", a clear admission that El Super disfavored Ms. Beltran's Union support. GCX 6. Moreover, this email was sent from the highest level manager at Ms. Beltran's store to a human resources manager at El Super headquarters, and at

no point was Mr. Luna's consideration of Ms. Beltran's Union support as a motivating factor in his decision ever corrected or even questioned. *Id.* It is hard to conceive of a more direct piece of evidence indicating that an employer harbored union animus.

Nevertheless, El Super's union animus can also be seen through its proclivity to violate the Act and contemporaneous commission of other unfair labor practices. *See*, *e.g.*, *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004) (proof of an employer's animus may be based on circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices); *see also Victor's Cafe 52*, 321 NLRB at 514 (employer's 8(a)(1) violations reflected clear union animus supporting notion that the employer reviewed employees' immigration status in retaliation for their protected activity). The Parties' most recent resolution of unfair labor practice charges (case 21-CA-160858) consisted of a formal settlement agreement that includes additional evidence of El Super's union animus. GCX 1(L)(I). Specifically, Section VI(7) of that Formal Settlement Stipulation (appearing on page 4 of the agreement), provides that "[t]he Respondent agrees that this Settlement Stipulation may be used in any proceeding before the Board or an appropriate court to show proclivity to violate the Act for purposes of determining an appropriate remedy." This proclivity to commit unfair labor practices provides additional evidence that El Super harbored union animus. Additionally, El Super violated Section 8(a)(1) of the Act when Mr. Luna presented Ms. Beltran with the March 29 Email, which indicated that her Union support was being considered as a factor in determining whether her vacation pay request would be granted. *See* Section III(C). This contemporaneous violation of the Act is further evidence of the Company's discriminatory intent.

In sum, El Super's union animus is clearly established through Mr. Luna's March 29 Email, El Super's admitted proclivity to violate the Act as established through the formal settlement agreement in case 21-CV-160858, and the commission of other, contemporaneous unfair labor practices.

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3. It is undisputed that El Super denied Ms. Beltran's request to use her paid vacation while on medical leave

The Parties' stipulations make clear that El Super never paid Ms. Beltran in response to her request to use paid vacation while on medical leave. While Ms. Beltran was ultimately paid out for the vacation hours that she could have used when she requested vacation in March, this payment came three months later, on June 24, 2016, and was responsive to the Parties' settlement agreement of the Union's 2015 unfair labor practice charge concerning El Super's unilateral change to the calculation of vacation benefits,[3] rather than to Ms. Beltran's March 2016 vacation request. JX 1 at ¶ 12. Moreover, this June payment obviously did not provide Ms. Beltran with the money that she wanted to use to support herself while recovering from surgery in late March 2016.

While El Super's witness Angelica Lima claimed at trial that it was her understanding, after speaking with El Super's Corporate Counsel, that "it would not be appropriate to pay [Ms. Beltran] since she was getting ready to . . . . get a payout on vacation per the settlement agreement," this understanding was simply incorrect. Tr. 243:17-25 (Lima). While it is true that Ms. Beltran received a vacation payment in April, the Company acknowledges that this was responsive to the 2015 Settlement Agreement – meaning this April payment covered unused vacation pay that should have been paid out to Ms. Beltran as of her anniversary date in *2015* – and not her March 22, 2016 vacation request. JX1 at ¶ 7. Moreover, the Company acknowledges that Ms. Beltran had vacation hours available to her at the time she made the request, and that these were not the same hours for which she received the April vacation payout. JX1 at ¶¶ 7, 8. Thus the April 2016 payment in no way satisfied Ms. Beltran's request to use her then-available vacation hours while on leave, nor would granting Ms. Beltran's request have affected the April 2016 payment. Thus, Ms. Lima's claim at trial that granting the request "would have messed it [(e.g. the April payment)] up because they would have had to dip onto that to compensate for the week that she was asking for," is simply wrong. This comment indicates, at best, that Ms. Lima had a poor understanding of what the 2015 Settlement Agreement payment reflected, and, at worst, calls her credibility as a witness into

[3] This settlement agreement is referred to hereinafter as the "2015 Settlement Agreement."

question. Tr. 248:14-16 (Lima). As the stipulations make clear, had Ms. Beltran's request been granted, she should have received three payments in April – one in the amount she was owed pursuant to the 2015 Settlement Agreement, one for interest on that amount (both of which she received on April 8, 2016), and one pursuant to her March 22, 2016 request. JX1 at ¶ 7. Ms. Beltran never received a third check responsive to her March 22, 2016 request, nor does the Company allege that she did, and thus it is clear that Ms. Beltran was never paid pursuant to her March 22, 2016 request.

It is also beyond dispute that a denial of a vacation request, such as the one at issue here, constitutes an adverse employment action within the meaning of the Act. This prong of the *Wright Line* test, the requirement of an "employer's adverse action," is therefore undisputed.

The Union has therefore established that Ms. Beltran engaged in protected activity, that management, and Mr. Luna in particular, were aware of Ms. Beltran's protected activity, that El Super harbored union animus, and that Ms. Beltran suffered an adverse employment action. As such, the Union has satisfied its burden of making out a *prima facie* case under *Wright Line*, and the burden of proof shifts to the Company to show that it would have made the decision regardless of Ms. Beltran's protected activity. As discussed at length below, the Company has failed to do so.

B. El Super cannot prove that it would have denied Ms. Beltran's request to use her paid vacation while on medical leave in the absence of her Union support because Mr. Luna's March 29 Email is direct evidence of an intent to discriminate, because the decision violates the CFRA and FMLA, because the decision violates the Interim Agreement, and because all of El Super's proffered justifications are either pretextual or false

After the General Counsel establishes a prima facie case, the burden then shifts to the employer to prove, as an affirmative defense, that it would have made the same decision regardless of the employees' protected activity. *SFO Good-Nite Inn,* 352 NLRB at 269. An employer does not meet its burden simply by alleging a legitimate reason for its actions, but rather, the employer must establish by a preponderance of the evidence that it would have taken the same action in the absence of protected activity. *Metro Transport LLC*, 351 NLRB 657, 659 (2007). And, as noted above, if "the reasons given for the employer's action are pretextual—that is, either false or not in

fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons." *SFO Good-Nite Inn,* 352 NLRB at 269.

1. Store Manager Jose Luna's March 29 Email is direct evidence of El Super's intent to discriminate against Ms. Beltran by denying her vacation request because of her Union support

El Super cannot prove that it would have denied Ms. Beltran's request in the absence of her Union support because Mr. Luna's March 29 Email is direct evidence of his intent to discriminate on the basis of such support with respect to the very employment benefit at issue – Ms. Beltran's vacation pay request. Store Manager Jose Luna's March 29 Email constitutes an admission that Ms. Beltran's protected activity was a motivating factor in the Company's decision to deny her vacation request. The email explicitly identifies Ms. Beltran's "pro union" status as a reason Ms. Lima should "talk" to Mr. Luna before the Company decided to "pay her." GCX 6. Further, the email was sent in response to a message from Human Resources explicitly stating that Ms. Beltran did, in fact, have sufficient hours to meet her request. It is hard to imagine a piece of evidence more clearly indicating that a manager discriminated against an employee based on her union support. Indeed, it is so obvious from this email that Mr. Luna was motivated by union animus in making his decision that the Company did not even attempt to provide countervailing evidence at trial. Instead, the Company's witnesses attempted to explain, through inconsistent and incomplete testimony, that Mr. Luna either did not make the decision, or that the *other* reasons listed in the email were sufficient grounds to deny the request, regardless of Mr. Luna's discriminatory motive. As explained below however, these explanations are simply not supported by the facts, nor would they be sufficient to undermine the Union's *prima facie* case at this stage of the burden shifting analysis if they were.

Significantly, as noted throughout, El Super cannot prove that its decision was not motivated by animus, or influenced by Mr. Luna's animus or the March 29 Email, because the Company has failed to indicate who ultimately made the decision to deny Ms. Beltran's vacation request, or why this decision was made. The Company suggested at trial that someone other than Mr. Luna made the decision to deny Ms. Beltran's request to use her paid vacation while on medical leave. The is factually incorrect; Mr. Luna denied Ms. Beltran's vacation request when he called her on the telephone shortly after her procedure and told her as much. While El Super

apparently disputes this position, the Company cannot prevail on this point merely by attacking the Union's articulation of events, given that a *prima facie* case has already been made; rather, El Super must provide its own theory of how and by whom the decision was made. El Super has failed to do so, and thus has also failed to discharge its burden of proving, as it alleges, that the decision would have been made regardless of Ms. Beltran's protected activity because the actual decision maker was unaware of such activity or did not have any union animus. On this basis alone, El Super has failed to carry its burden under *Wright Line*.

2. El Super's decision to deny Ms. Beltran's vacation request violated the Family Medical Leave Act and the California Family Rights Act

El Super cannot prove that it would have denied Ms. Beltran's request in the absence of her Union support because the decision to do so violated the Family Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"). This means that El Super cannot articulate a legitimate business justification for its decision because its decision to deny Ms. Beltran's request was independently unlawful.

It is clear that Ms. Beltran's leave was qualifying medical leave under both the is FMLA and the CFRA. The plain language of both the FMLA and CFRA makes clear that these statutes cover leave necessitated by a "serious health condition that makes the employee unable to perform the functions of the position" of that employee. *See* 29 U.S.C.A. § 2612(a)(1)(D) (West); Cal. Gov't Code § 12945.2 (c)(3)(C) (West). Under the FMLA, employees are "entitled" to qualifying leave "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.A. § 2612(a)(1)(D) (West). Under the CFRA, employees are entitled to qualifying "[l]eave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee." Cal. Gov't Code § 12945.2 (c)(3)(C) (West). Ms. Beltran took leave for her own surgery and to recover from that surgery. Tr.108:6-109:16 (Beltran) There can be no doubt, nor does El Super dispute, that this purpose qualified Ms. Beltran for leave under these two statutes.

Moreover, both of these statutes require employers to allow their employees to use accrued vacation time while on qualifying medical leave. Under the CFRA, "[a]n employee may elect to use

or an employer may require an employee to use any accrued vacation time or other paid accrued time off . . . that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave." 2 Cal. Code Regs. § 11092(b)(1). Likewise, under the FMLA, "[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection." 29 U.S.C. § 2612(d)(2)(B). Thus both the FMLA and the CFRA require that an employee be allowed to use their accrued, paid vacation time while on qualifying medical leave. El Super has failed to articulate why their decision to deny Ms. Beltran's request to use her paid vacation while on qualifying medical leave would have complied with the FMLA or the CFRA. Given that El Super's denial of Ms. Beltran's vacation violated state and federal law, they cannot convincingly argue that they would have made the same decision in the absence of her protected activity.

3. El Super's decision to deny Ms. Beltran's vacation request violated the Parties' Interim Agreement

El Super cannot prove that it would have denied Ms. Beltran's request in the absence of her Union support because the decision to do so violated the Implemented Agreement. While Mr. Luna claims in the March 29 Email, and El Super's witnesses asserted at trial, that Ms. Beltran was required to provide thirty day's notice for all vacation requests, the Implemented Agreement makes clear that this requirement does not apply to vacation requests made for medical purposes. GCX 2. Specifically, Article 18, Section 3 of the Implemented Agreement states, in relevant part, "[f]or vacation requests made during the year, employees must request vacation from their supervisor, at least thirty (30) days in advance of the first day of the desired/requested vacation. Shorter notice periods will be considered when using vacation as part of Family and Medical Leave Act ('FMLA') circumstances." GCX 2. Thus the Implemented Agreement contains an exception to the thirty day's notice requirement for vacation used in circumstances implicating the FMLA, which, as described above, was clearly the case here.

As such, the argument that Ms. Beltran's request was denied because she did not provide sufficient notice is not compelling. To the contrary, the Implemented Agreement explicitly requires that vacation pay be granted in these circumstances. Article 22 of the Implemented Agreement, entitled "Family and Medical Leave Act" states "[t]he Company will comply with all applicable state and federal laws which address employee rights to request or obtain a family or medical leave of absence." *Id.* Thus El Super is required, per the Implemented Agreement, to comply with the provisions of both the CFRA and FMLA listed above, which, in turn, require employers to allow employees to use accrued vacation while on qualifying leave. El Super's denial of Ms. Beltran's vacation pay request therefore violated Article 22 of the Implemented Agreement.

Furthermore, a review of the Implemented Agreement makes clear that medical leave holds a special status among various types of leave, and that requests to use paid vacation while on medical leave should not be encumbered by considerations that typically apply to other leave requests. For example, Article 24 of the Implemented Agreement, entitled "Leave Of Absence," states "[l]eave requests for reasons not covered by the Family and Medical Leave Act ("FMLA") or Children's School Activity Leave Act language of Articles 22 and 23 hereof, will be considered by the Company; and, if granted, will be subject to requirements established by the Company." *Id.* Thus while requests that are not related to medical leave are "subject to requirements established by the Company," leave requests that are related to medical leave are not bound by that proviso, but are rather controlled by Article 22, quoted above.

This is not surprising, given that both the FMLA and CFRA require that employees be allowed to use paid vacation while on qualifying medical leave. Thus Mr. Luna's claim in his email (Mr. Luna did not testify, of course) that Ms. Beltran was required to provide thirty day's notice of her vacation request is simply wrong because it is inconsistent with the Implemented Agreement, which allows employees, as is required by law, to provide a shorter notice when requesting vacation to cover an FMLA- or CFRA-qualifying leave. By the same toke, El Super cannot prove that it would have made the same decision in the absence of Ms. Beltran's protected activity because that decision would have, and did, violate the terms of the Implemented Agreement.

4. El Super's nondiscriminatory justifications for denying Ms. Beltran's request for paid vacation proffered at trial are either pretextual or false

Moreover, El Super's arguments are almost entirely contradictory, alternatively stating that Ms. Beltran's request was denied because she did not follow the proper vacation request procedures (Tr.188:7-16 (Ruiz)), because she did not have sufficient hours to meet the request (Tr. 265:1-7 (Lima)), or because the payout would be duplicative given that she was already getting paid per the settlement (Tr. 243:17-25 (Lima)). Even if these reasons were legitimate, the fact that they contradict each means that El Super has failed to provide a credible, unified explanation of why the decision was actually made. *Metro Transport LLC*, 351 NLRB at 659. The Company's lack of a comprehensive explanatory theory is made obvious by the fact that *they never provided any testimony regarding who made the decision, let alone have this individual, or any other witness, explain why the decision was made*. In such circumstances, merely articulating potential reasons the decision could have been made is not enough for El Super to discharge its burden of showing that it would have denied Ms. Beltran's request irrespective of her Union support, particularly where these reasons are not proper grounds to deny the request. As such, El Super has failed to carry its burden under *Wright Line* and its progeny to show that it would have made the decision in the absence of Ms. Beltran's protected activity.

i. El Super's claim that Ms. Beltran never submitted a vacation request is not supported by any credible evidence, nor were Ms. Beltran's claims to the contrary refuted even if Miguel Ruiz's testimony is credited

The Company apparently asserts that it would have made the decision to deny Ms. Beltran's vacation request, even in the absence of her protected activity, because she failed to complete the proper vacation request forms. This is factually incorrect; as Ms. Beltran plainly described, she *did* complete a vacation request form. Tr. 109:14-21 (Beltran). To make its contrary claim, El Super relies solely on the account provided by Assistant Store Manager Miguel Ruiz, whose testimony is neither credible, nor sufficient, even if credited, to establish that Ms. Beltran never completed a vacation request form on March 22, 2016. Significantly, El Super did not produce Mr. Luna, who is the only individual, along with Ms. Beltran, who can conclusively state what took place between them on March 22 since Ms. Beltran and Mr. Luna were the two parties to the conversation.

Mr. Ruiz's testimony is unreliable and should not be given much, if any, weight in determining what actually took place on March 22, 2016. At the outset, Mr. Ruiz admits that he played no role in the events in question, but just happened to be in the office at the time that Ms. Beltran presented Mr. Luna with her doctor's note and vacation request form. Tr. 176:20-178:21 (Ruiz). He was not a party to the conversation between Ms. Beltran and Mr. Luna. *Id.* It is therefore not surprising that Mr. Ruiz's explanation of the events of March 22, 2016 – for him an inconsequential event on an inconsequential day over a year ago – is extremely hazy. While Mr. Ruiz initially stated that Ms. Beltran "just handed in this one doctor's note and left" Tr. 183:13-22 (Ruiz), he later admitted that he and Mr. Luna exchanged pleasantries with Ms. Beltran in Spanish upon her entering and exiting the office. Tr. 188:25-189:22 (Ruiz). Despite this extremely limited interaction Mr. Ruiz describes, Mr. Ruiz claimed that this meeting somehow lasted between three and five minutes. Tr. 183:13-22 (Ruiz). Thus, even from those aspects of Mr. Ruiz's testimony that initially appear credible, it is clear that many of the details have been lost or forgotten.

While the foregoing details from Mr. Ruiz's testimony are relatively innocuous, more concerning is Mr. Ruiz's categorical denial that documents are ever lost from the yellow binder in which time-off request forms and vacation request forms are kept. Such a blanket statement regarding administrative record-keeping for an international company is highly unlikely to be true in any context, but it is particularly troubling here, given that the very doctor's note about which Mr. Ruiz testified appears to have been lost, at least momentarily. That is, El Super failed to produce the very doctor's note about which Mr. Ruiz testified in response to a subpoena after a "diligent search of the documents that the company had access to" conducted by Vice President of Labor Relations Victor Santillan until the second day of hearing. Tr. 20:3-11 (Perez). Mr. Ruiz's testimony on this point is therefore plainly incorrect, which casts doubt on the rest of his testimony, too.

In addition, many of Mr. Ruiz's claims simply do not make any sense. For instance, Mr. Ruiz states that Ms. Beltran entered the office, presented the doctor's note that she had in her possession already, and left, without ever checking with anyone at the Store to see if her leave was permissible, despite the fact that she would be gone for two weeks starting the very next day. Tr.

188:7-16 (Ruiz). In addition, the meeting Mr. Ruiz describes, by his own admission, would have constituted a break in normal procedure. Mr. Ruiz admits that it is a common practice for employees to fill out time-off requests when they come in to the manager's office to request time off. Tr. 192:11-14 (Ruiz). This is not surprising, given that time-off requests are only available through the store manager or assistant store manager's computer, and therefore an employee could only get such a form in the managers' office. Tr. 192:15-23 (Ruiz). However, per Mr. Ruiz's testimony, neither he nor Mr. Luna asked Ms. Beltran to complete a time-off request form. Mr. Ruiz provided no explanation for this departure from El Super's standard procedure. While it is true that the doctor's note Ms. Beltran submitted indicated the time that she would be medically unable to work, Mr. Ruiz acknowledged that employees have filled out time-off requests when they have presented doctor's notes in the past. Tr. 199:13-15 (Ruiz). Indeed, Mr. Ruiz earlier claimed that it was his understanding that Ms. Beltran was only providing the note as proof that her absence was justified because she frequently called in sick, rather than as an actual request to take time off for her imminent medical procedure and recovery. Tr. 186:21-25 (Ruiz). Thus it appears, per Mr. Ruiz's testimony, that Ms. Beltran never actually requested any time off at all, let alone requested to be paid for such time. However, given that Ms. Beltran received no discipline for missing several weeks of work, this clearly cannot be the case. Mr. Ruiz's testimony is therefore undoubtedly incomplete, at best, and should be discredited.

Finally, Mr. Ruiz contradicts the other Company witnesses on a number of crucial points regarding how vacation pay and time-off requests are processed. For instance, Mr. Ruiz testified that employees are granted time off even if they do not complete a time-off form, but that "[t]he form is just so they can get paid properly." Tr. 198:5-13 (Ruiz). This contradicts the testimony of both of the Company's other witnesses, who assert that it is the vacation request form that determines whether an employee will be paid. Likewise, Mr. Ruiz repeatedly claimed that medical information is not segregated in employees' files. Tr. 194:15-195:1 (Ruiz). This assertion was directly and repeatedly contradicted by Vice President of Labor Relations Victor Santillan, who clearly indicated that medical information is segregated in Company records to comply with state and federal law. Tr. 216:16-18 (Santillan). In addition to the fact that Mr. Ruiz was not a party to

the interaction between Ms. Beltran and Mr. Luna in issue here, given Mr. Ruiz's confusing articulation of events, lack of concern for detail, and inability to accurately explain the mechanics of El Super's time-off and vacation request procedures, his testimony should not be credited.

In contrast, Ms. Beltran's articulation of the events of March 22 provide substantially more detail, correspond with policies and procedures described by every other witness at trial, and is generally more consistent and logical than that provided by Mr. Ruiz. Given that Mr. Ruiz's testimony is the Company's only evidence that Ms. Beltran never completed a time-off or vacation request form on March 22, it has clearly failed to establish that it would have denied Ms. Beltran's request even in the absence of her protected activity on the basis that she did not complete the correct forms.

The above notwithstanding, even if we take Mr. Ruiz's testimony to be true, it is still inconclusive to establish that Ms. Beltran never completed a time-off or vacation request form. Mr. Ruiz had no way of knowing how many or what types of documents Ms. Beltran gave Mr. Luna, given that he was sitting on the other side of the table, was not a party to the interaction between Ms. Beltran and Mr. Luna, and was not handed the documents himself. Likewise, Mr. Ruiz admitted that it was possible Ms. Beltran completed a vacation request form at another time, when he was not in the office. Tr. 197:4-8 (Ruiz). In short, even if we credit Mr. Ruiz's, it is insufficient to establish that Ms. Beltran failed to complete the requisite forms to receive vacation pay during her medical leave because Mr. Ruiz's involvement in the request was so limited and incidental. This sort of evidence, standing alone, is simply insufficient to satisfy El Super's burden to show that it would have made the same decision in the absence of protected activity.

ii. El Super has failed to prove that anyone other than Jose Luna made the decision to deny Ms. Beltran's vacation request

The Company apparently asserts that someone other that Mr. Luna - who was not motivated by animus - made the decision to deny Ms. Beltran's vacation request, and therefore it would have made the same decision even in the absence of Ms. Beltran's protected activity. This argument must fail, however, because El Super has failed to show either that Mr. Luna lacked the authority, per Company policy, to deny Ms. Beltran's vacation request, or that he was not, in fact, the one to deny Ms. Beltran's vacation request.

The Company attempts to establish that a third party made the decision to deny the request based solely on (1) Ms. Lima's claims regarding her "understanding" after meeting with El Super's Corporate Counsel, and (2) Ms. Lima's bare assertions regarding the scope of Mr. Luna's authority under Company policy. Tr. 243:17-25; 255:8-10 (Lima). Neither argument is compelling.

The first argument, that Ms. Lima's "understanding," after meeting with El Super's Corporate Counsel, was that the payment would be inappropriate on the basis that Ms. Beltran was already paid pursuant to the settlement agreement, is unavailing. The purpose of seeking vacation pay while on medical leave is to have the money available while actually on leave. Ms. Beltran took leave beginning March 23, 2016, but was not paid the hours she had available at the time of her leave until June 24, 2016, when she received a second payment pursuant to the 2015 Settlement Agreement, not her vacation request. The Company does not, nor could it credibly, allege that it takes three months to process vacation requests. Indeed, Mr. Santillan acknowledged that two to three weeks is generally sufficient notice to be paid on time. Tr. 217:15-17 (Santillan). While Ms. Beltran did receive two checks on April 8, 2016, these were also made pursuant to the 2015 Settlement Agreement, as the Parties have stipulated, and were therefore not responsive to Ms. Beltran's request. As noted above in Section III(A)(3), Ms. Beltran was entitled to receive the two April 8, 2016 payments *in addition to* payment of her then-available accrued vacation pursuant to her March 22 request. Likewise, Ms. Beltran was not paid for the vacation hours that she had available to use at the time she made her request until June 24, 2016. JX 1 at 12.

Moreover, if this were Ms. Lima's understanding– i.e. that Ms. Beltran's request was legitimate and warranted payment but was effectively moot since she was about to be paid pursuant to the 2015 Settlement Agreement, Ms. Lima's failure to correct Mr. Luna's denial, which she would have had to have realized was improper – should be considered an independent basis for finding an 8(a)(3) violation. In sum, stating that the subsequent decision was made to deny Ms. Beltran's request because it was about to become moot by operation of the 2015 Settlement Agreement, is no defense to El Super's earlier denial Ms. Beltran's request on the basis of her protected activity, or its failure to correct this earlier denial once it was discovered to be improper.

The Company's second argument, that Mr. Luna could not have made the decision to deny Ms. Beltran's request because he lacked the authority to do so, also falls flat upon inspection.

To begin, it is not clear that Mr. Luna lacks the authority to deny vacation requests per Company policy from the facts in evidence. Ms. Lima, the sole witness that testified at trial regarding Mr. Luna's authority with respect to granting vacation requests, has a tenuous understanding of El Super's vacation policy. While Ms. Lima explained the majority of the Company's vacation policies and procedures at trial, she also admitted that "[v]acation and the process of FMLA is not part of [her] responsibilities," and thus she only had a "general understanding" of those policies and procedures. Tr. 266:9-10 (Lima). Thus Ms. Lima's statements that "[n]o one at the store has the authority to grant or deny a vacation request" Tr. 225:9-10 (Lima) must be viewed in light of this limited understanding and authority in this area. This claim is further called into question by her explanation as to why store managers do not have this authority – namely, that all such requests are determined by the "VP of HR or corporate counsel" (Tr. 244:25 (Lima)) because the "vacation records are kept at corporate" (Tr.225:12-15 (Lima)). First, it is almost inconceivable that all vacation requests for an international corporation with fifty-eight locations in North America alone Tr: 225:16-18 (Lima), and presumably tens of thousands of employees, are made by two high-ranking executive employees, who presumably have much more important things to do than process vacation requests.[4] Moreover, the notion that this highly centralized and inefficient arrangement is in place solely because "vacation records are kept at corporate" is also highly questionable, given such information is easily available upon request. GC 9. In sum, Ms. Lima's articulation of El Super's vacation policy based only on her "general knowledge" about an area that is "not [her] responsibility" is insufficient to establish that store managers do not have the authority to grant or deny vacation requests. Tr. 243:17-25 (Lima).

[4] Mr. Santillan described his duties as overseeing "all matters of personnel for the company, including the Union stores," managing HIPPA compliance, and managing "17 individuals in the corporate office." Tr. 212:22-213:14 (Santillan). The Company's "corporate counsel" Joe Angulo is Mr. Santillan's supervisor, and therefore even higher rankinging than Mr. Santillan. *Id.*; 225:1-7 (Santillan).

Furthermore, Ms. Lima lacks sufficient knowledge to credibly speak to the practices and procedures at the Anaheim Store during Mr. Luna's tenure, even if one credits her description of El Super's practices and procedures generally. Ms. Lima only began working for El Super in late March of 2016 Tr. 226:7, 21 (Lima), and Mr. Luna left Store 11 on April 7, 2016. Tr. 250:14-17 (Lima). Therefore, Ms. Lima only worked with Mr. Luna for a couple of weeks at most. Moreover, during this period, and indeed, over the next several months, Ms. Luna was "still getting to know [her] new stores that [she] had just gotten." Tr. 240:24-241:2 (Lima). Ms. Lima's onboarding was so demanding of her time that she "didn't have a chance" to follow up on Mr. Perez's March 28 email (GCX 4) until he reminded her eight days later. Tr. 240:24-241:2 (Lima). Thus in the only two-week period during which Ms. Lima could have possibly familiarized herself with the practices of the Anaheim Store as ran under Mr. Luna, she was also struggling to learn the practices of two other stores for which she had just become responsible, while still continuing to support 26 additional stores plus the corporate office. Tr. 226:3; 228:1-8 (Lima). It therefore tests the limits of credulity to assert that Ms. Lima could credibly speak to Mr. Luna's practices or the practices at the Anaheim Store. Significantly, there was no evidence that the Anaheim Store followed the policies and procedures issued by corporate headquarters while Mr. Luna was the chief manager at that store.

Finally, even if one credit's Ms. Lima's testimony (1) that Mr. Luna lacked the authority to deny vacation requests per Company policy, and (2) that the Anaheim Store during Mr. Luna's tenure as store manager complied with this policy, none of this contradicts the fact that Mr. Luna did, in fact, make the decision to deny Ms. Beltran's vacation request when he called Ms. Beltran in late March and reported that her request had been denied. The scope of Mr. Luna's authority has little bearing on what he may or may not have done in practice. Indeed, making employment decisions based on discriminatory motives is also presumably a violation of Company policy, not to mention federal law, but this did not prevent Mr. Luna from raising this issue in the March 29 Email as grounds for denying Ms. Beltran's request. Likewise, as the highest-ranking manager at the Anaheim Store, Mr. Luna had wide authority to act on his discriminatory motives without any substantial oversight. This was particularly true at the time in question, when there was no Human

Resources Manager responsible for the Anaheim Store. Tr. 227:12-15 (Lima). Finally, it should be noted that Mr. Luna separated from the Company within weeks of making this decision, on April 7, 2016, and therefore was completely immune from any disciplinary consequences for violating Company policy. Tr. 250:12-17 (Lima). Moreover, the Company's failure to identify who, under their theory of the case, made the decision to deny Ms. Beltran's request makes it impossible to prove that this individual was not also motivated by union animus, or influenced by Mr. Luna or the March 29 Email. Thus, even if we credit the testimony of El Super's witnesses, El Super still has failed to carry its burden of proving that someone other than Mr. Luna made the decision, that this person was unaware of Ms. Beltran's activity or did not act on the basis of union animus, and therefore that the decision would have been made in the absence of protected activity.

In sum, given Mr. Luna's clearly expressed discriminatory motive, the uncontroverted testimony of Ms. Beltran regarding this phone call, and the weakness of the Company's argument regarding Mr. Luna's authority, there is little room to doubt that this conversation actually took place.

iii. El Super claims that it denied Ms. Beltran's vacation request because she did not have sufficient vacation hours to cover the entire period she requested, because she did not make the request thirty days in advance, or because she exhausted her sick leave are also incorrect or unavailing

Finally, El Super's remaining arguments as to why they would have denied Ms. Beltran's request even in the absence of her protected activity are not credible.

El Super's claim that it denied Ms. Beltran's request because she did not have sufficient vacation hours is directly contradicted by the testimony of its own witnesses. Ms. Lima admitted at trial that vacation requests are generally approved if an employee has "some" hours available to use. Tr. 266:15-24 (Lima). This is supported by numerous other instances in which employees have been granted vacation requests for some of the time they requested, even if they do not have sufficient hours to cover the entire request. GCX 10. In addition, at the time Mr. Luna denied Ms. Beltran's request over the phone in March, Mr. Luna had no way of knowing whether she had enough accrued vacation time to cover her request. In sum, there is absolutely no evidence to support that Ms. Beltran's vacation request should have been, or was in fact, denied because Ms.

Beltran had insufficient hours, nor is there any evidence that the decision maker, Mr. Luna, was aware that Ms. Beltran did not have sufficient vacation hours at the time he denied her request.

It is equally clear that Ms. Beltran's request was not denied because she failed to provide thirty day's notice, as this requirement would be at odds with the terms of the Implemented Agreement and state and federal law, as described above.

Finally, there is no evidence that El Super denied Ms. Beltran's request because she exhausted or misused her sick leave. While Mr. Luna, in the March 29 Email, raises the issue that Ms. Beltran called in sick "a lot," Mr. Luna was aware that this, too, was not a legitimate basis to deny a vacation request per the Implemented Agreement. Significantly, the Implemented Agreement does not list over-use of sick leave as a legitimate reason to deny a request for paid vacation. EX 2. Moreover, the Company does not assert that Ms. Beltran's previous use of sick leave was the reason, or even a potentially legitimate reason, for denying Ms. Beltran's request. Thus raising this issue in the March 29 Email, as with the thirty day issue, served only to provide tepid, post-hoc justification to a decision that was clearly motivated by anti-union animus.

The Company has therefore, for all of the foregoing reasons, failed to carry its burden under *Wright Line* to prove that it would have denied Ms. Beltran's request for paid vacation while on medical leave even in the absence of her protected activity. As such, the Union's *prima facie* case stands, and the Judge should conclude that El Super's failure to provide paid vacation to Ms. Beltran while on medical leave violated Section 8(a)(3) of the Act.

C. El Super Violated Section 8(a)(1) Of The Act By Giving The March 29 Email To Ms. Beltran And Thereby Demonstrating The Negative Employment Consequences that Can Result From Her Union Support

By providing Ms. Beltran with a copy of the March 29 Email, El Super demonstrated the negative consequences that had, and would continue to, befall Ms. Beltran if she continued to support the Union. This violates Section 8(a)(1). *See, e.g., Commercial Erectors, Inc.*, 342 NLRB 940, 942 (2004) (midlevel supervisor's statements to prospective employees conveying that owner would "not hire them because of their union activities and affiliation" constituted violation of Section 8(a)(1) even where supervisor indicated statements were only meant to "'alert'" employees not to talk to the owner and claimed to not have hiring power).

As described above, upon requesting a printout of her accrued vacation, Mr. Luna presented Ms. Beltran with the March 29 Email. This email correspondence includes Mr. Luna's advocacy against Ms. Beltran's request to use her vacation towards her medical leave on the grounds that she "is pro union." GCX 6; EX 1. It shows that Mr. Luna was hostile toward her union activity and sympathies and would take adverse employment action against Ms. Beltran on account of her union activity and sympathies. Obviously Ms. Beltran's receiving an email chain documenting the fact that an adverse employment consequence she suffered arose directly form her union support, and that her store manager – the highest-ranking manager at her store – thinks that union support is a reason to deny her request for vacation leave, would tend to discourage further union support. Thus by giving Ms. Beltran a copy of this email chain, El Super discouraged her further support of the union in violation of Section 8(a)(1).

D. Special Remedies Are Warranted Due To El Super's Proclivity To Violate The Act

Special remedies are appropriate here given El Super is a recidivist employer with a proclivity to violate the Act. The Union therefore joins the General Counsel in seeking "an order requiring that the Notice to Employees be read by Respondent in English and Spanish to assembled employees at each of the stores referred to above [9170 Woodman Avenue, Arleta, California 960 West Arrow Highway, Covina, California; 1301 East Gage Avenue, Los Angeles, California; 10531 South Carmenita Road, Santa Fe Springs, California; 1100 West Slauson, Los Angeles, California; 650 North Euclid Street, Anaheim, California; and 3321 West Century Boulevard, Inglewood, California] during paid work time," that "[a]ttendance at the Notice reading" be "mandatory for all employees," and for all other relief that may be just and proper.

A history of violating the Act warrants extraordinary remedies, such as a notice posting at multiple facilities (*see, e.g., Florida Steel Corp.*, 224 NLRB 45 (1976)), and a requirement to read the notice out loud (*see, e.g., Sprain Brook Manor Nursing Home, LLC*, 361 NLRB No. 54 (2014) *reaff'g* 359 NLRB 929, 929 (2013) (recess appointment)). El Super's proclivity to violate the Act, as recognized by the formal settlement in case 21-CA-160858, warrants the imposition of extraordinary remedies here. *See CGC Opp. to Respondent's Motion for Approval*, March 22, 2017,

Ex. I, pg. 4. Moreover, the instant Complaint occurred in the context of numerous other charges occurring in the course of protracted and contentious successor-contract negotiations. In such circumstances, both a requirement to post notices at several stores and a requirement to read the notice at the store where the violation occurred are wholly appropriate.

IV. CONCLUSION

Therefore, for all of the foregoing reasons, UFCW Local 324 respectfully requests that the Judge find that El Super violated Sections 8(a)(1) and (3) of the Act.

Dated: May 22, 2017

Respectfully submitted,

GILBERT & SACKMAN
A LAW CORPORATION

By _____
TRAVIS S. WEST

Attorneys for Charging Parties United Food and Commercial Workers Union, Local 324

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California; my business address is 3699 Wilshire Boulevard, Suite 1200, Los Angeles, California 90010.

I hereby certify that on May 23, 2017, I caused a true and correct copy of the foregoing document(s) described as **CHARGING PARTY'S POST-TRIAL BRIEF** to be filed on the following party using the NLRB E-filing system:

Judge Gerald M. Etchingham
National Labor Relations Board
Division of Judges, San Francisco Office
901 Market Street Suite 300
San Francisco, California 94103-1779

I hereby further certify that a copy of the foregoing document was duly served upon the parties, via e-mail:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 23, 2017 at Los Angeles, California.

Darcy Garretson Laparra